

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36065

SAHIBDAT SHARAFI,)	2010 Unpublished Opinion No. 311
)	
Petitioner-Appellant,)	Filed: January 13, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Orders of the district court denying motion for appointment of counsel and summarily dismissing application for post-conviction relief, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Sahibdat Sharafi appeals from the district court's order summarily dismissing his application for post-conviction relief. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

A partial factual and procedural history of this case is set forth in Sharafi's direct appeal to this Court, *State v. Sharafi*, Docket No. 34045 (Ct. App. July 30, 2008) (unpublished), as follows:

Sahibdat Sharafi was found guilty of felony domestic violence in the presence of children. I.C. § 18-903, 18-918(7)(b). The district court imposed a unified twenty-year sentence with a ten-year determinate term, but suspended the sentence and placed Sharafi on probation. Following a violation of his probation, the district court ordered execution of the sentence, but after a period of retained jurisdiction, again suspended the sentence and placed Sharafi on probation. Subsequently, Sharafi admitted to violating the terms of the probation, and the

district court consequently revoked probation and ordered execution of the original sentence.

Sharafi appealed, contending that the district court abused its discretion in revoking probation and also arguing that his sentence was excessive. This Court affirmed the district court. *See State v. Sharafi*, Docket No. 34045 (Ct. App. July 30, 2008) (unpublished).

Sharafi subsequently filed a pro se application for post-conviction relief alleging that his sentence constituted cruel and unusual punishment. In addition, he filed a motion requesting appointment of counsel. The district court issued a notice of intent to summarily dismiss Sharafi's application noting that the sole issue was whether the imposition of a twenty-year sentence constituted cruel and unusual punishment. The court determined that Sharafi's claim could not be raised in post-conviction because it had already been finally adjudicated. The court concluded that Sharafi could not develop a viable claim, even with the assistance of counsel. Thus, the court denied Sharafi's motion requesting appointment of counsel and notified Sharafi of its intention to dismiss his application.

The State filed an answer and moved for summary dismissal contending that the application was barred by res judicata because the same claim was presented on direct appeal. The State also argued that Sharafi's claim should be denied on the merits. Sharafi responded to the State's motion and the district court's notice of intent to dismiss conceding that the issue presented in his application for post-conviction relief was "similar in substance to [sic] claim that was raised on appeal," but arguing that "in its current context contains different elements of the sentence challenge and further lays the foundation for a sentence that violates the U.S. Constitution." Sharafi also claimed that his "appellate attorney was ineffective for failing to raise the claim of excessive sentence on appeal under the standard that the petitioner now raises before this court." The post-conviction court held that Sharafi's claim was "patently frivolous, both as to the merits as addressed by the Court of Appeals, and for procedural reasons where the matter has already been decided," and dismissed his application. Sharafi appeals.

II.

ANALYSIS

An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like

the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). “An application for post-conviction relief differs from a complaint in an ordinary civil action[.]” *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The application must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court’s own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. “A claim for post-conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof.” *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible when the applicant’s evidence has raised no genuine issue of material fact that, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the State does not controvert the applicant’s evidence because the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

On review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, ___Idaho___, ___P.3d___ (Oct. 26, 2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, “while the underlying facts must be regarded as true, the petitioner’s conclusions need not be so accepted.” *Rhoades*, ___Idaho at ___, ___P.3d at ___ (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); see also *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

Sharafi’s argument on appeal is three-fold. First, he contends that the district court erred in summarily dismissing his application without addressing his claim of ineffective assistance of counsel. Second, he argues that the court incorrectly determined that Sharafi’s claim regarding cruel and unusual punishment had previously been raised and decided. Third, he asserts that the district court erred in failing to appoint counsel. Because we agree with the district court that Sharafi has not presented a viable claim, his contentions on appeal are meritless.

In *Knutsen v. State*, 144 Idaho 433, 438, 163 P.3d 222, 227 (2007), a case not cited by Sharafi on appeal, we held that “I.C. § 19-4901(b) precludes consideration of a cruel and unusual punishment challenge to the length of a sentence in post-conviction proceedings because that challenge could be raised on direct appeal.” We further held that “a challenge to the length of the sentence on cruel and unusual punishment grounds in post-conviction proceedings is barred by the doctrine of res judicata when the applicant argued on direct appeal that the sentence is excessive under state law reasonableness standards.” *Id.* at 440, 163 P.3d at 229. Sharafi did not raise a claim of cruel and unusual punishment on direct appeal and is, therefore, precluded from raising it in his application for post-conviction relief. *Id.* at 438, 163 P.3d at 227. Furthermore, Sharafi is barred by the doctrine of res judicata from raising this claim as this Court has already

affirmed the reasonableness of his sentence. *See State v. Sharafi*, Docket No. 34045 (Ct. App. July 30, 2008) (unpublished).

Sharafi's claim of ineffective assistance of counsel is based upon counsel's failure to raise a claim of cruel and unusual punishment. Because we have determined that Sharafi's underlying cruel and unusual punishment claim has no merit, we need not further address his claim of ineffective assistance of counsel. In addition, while a court generally must address a request for counsel before ruling on substantive issues, Sharafi was not entitled to have counsel appointed because, as the district court noted, he could not present a viable claim even with the assistance of counsel. *See Charboneau v. State*, 140 Idaho 789, 102 P.3d 1108 (2004).

III.

CONCLUSION

The district court's orders denying Sharafi's motion for appointment of counsel and summarily dismissing Sharafi's application for post-conviction relief are, therefore, affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**